IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. JESUS ALBERTO QUEVEDO, Appellant.	)	2 CA-CR 2006-0031 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20051913

Honorable Frank Dawley, Judge Pro Tempore

AFFIRMED

Terry Goddard, Arizona Attorney General
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E S P I N O S A, Judge.

¶1 After a jury trial, appellant Jesus Alberto Quevedo was convicted of aggravated assault causing temporary but substantial impairment or fracture of a body part, a class four felony. After he admitted he had one historical prior felony conviction, the trial court sentenced him to a mitigated prison term of 2.25 years. On appeal, he challenges the trial

court's refusal to instruct the jury on a justification defense and its denial of his motion for new trial made on the same ground. We affirm for the reasons stated below.

¶2 Defense of premises is among the statutory justification defenses a defendant may assert. *See* A.R.S. §§ 13-401, 13-407. Quevedo is correct that "a defendant is entitled to a justification instruction if it is supported by 'the slightest evidence.'" *State v. Hussain*, 189 Ariz. 336, 337, 942 P.2d 1168, 1169 (App. 1997), *quoting State v. Dumaine*, 162 Ariz. 392, 404, 783 P.2d 1184, 1196 (1989); *see also State v. Ruggiero*, 211 Ariz. 262, ¶ 10, 120 P.3d 690, 692-93 (App. 2005). The trial court denied Quevedo's request that it give a defense-of-premises instruction pursuant to § 13-407 after the close of evidence. The court also denied Quevedo's motion for new trial, which was based on the rejection of this instruction. We review both the trial court's refusal to give a justification instruction and the denial of the motion for new trial based on that refusal for an abuse of discretion. *See Ruggiero*, 211 Ariz. 262, ¶ 6, 120 P.3d at 692. We cannot say the trial court abused its discretion here.

¶3 Section 13-407(A) provides, in relevant part, as follows:

> A person . . . in lawful possession or control of premises is justified in . . . threatening or using physical force against another when and to the extent that a reasonable person would believe it immediately necessary to prevent or terminate the commission or attempted commission of a criminal trespass by the other person in or upon the premises.

Notwithstanding the evidence Quevedo points to on appeal, the trial court did not abuse its discretion in refusing to instruct the jury on this defense.

¶4 We initially disagree with Quevedo that the trial court applied the wrong standard in deciding whether to give the requested instruction. The court had considered the propriety of the instruction during trial, when defense counsel stated during a break in a witness's testimony that evidence to support the defense was "starting to develop." Although the court was skeptical at that point, stating it was only looking for "minimal evidence" to support the instruction, the court deferred making a decision. Ultimately, the court concluded there was insufficient evidence to warrant giving the instruction, stating,

> I'm not convinced there's evidence to support it. I understand how the law reads, even my instruction reads, but I think there's implicit in this a subjective thought process as well. It's sort of a subjective/objective test. The defendant has to act with a certain purpose and that purpose has to be . . . reasonable under the circumstances.

¶5 Quevedo maintains his subjective belief is not the issue, but whether a reasonable person would have believed shoving the victim was necessary to prevent her from trespassing. However, what a reasonable person might, in the abstract, have believed does not establish a defense for a defendant whose own statements negate or fail to establish such a defense. Rather, based on the statute, the question is whether the evidence showed the defendant believed he was defending premises and whether that belief was reasonable. *See generally State v. Garfield*, 208 Ariz. 275, ¶ 15, 92 P.3d 905, 909 (App. 2004) (inquiry is whether evidence showed defendant's use of deadly force to keep victim from entering home was reasonable and whether such force was necessary to prevent victim from committing murder or assault). That is precisely the standard the court applied; the court was correct.

¶6 In contending he presented sufficient evidence to secure the instruction, Quevedo underscores the testimony of his girlfriend Angela, the victim's daughter. According to that testimony, Quevedo pushed the victim to the ground, breaking her foot, only after the victim had twice entered Quevedo's residence and had assaulted Angela in so doing. Angela testified that, during those assaults, the victim had repeatedly pushed her to the ground, while advancing forward. And, although Quevedo's pushing the victim had undisputedly occurred in the street in front of Quevedo's residence—rather than on the premises itself—Angela maintained that Quevedo had taken that action only after the victim had first pushed Quevedo in the direction of Quevedo's premises.

¶7 We agree with the general proposition that a person might reasonably act to defend his or her home against a person who has twice intruded therein and who has again moved belligerently in that direction. But, as the trial court concluded, Quevedo failed to present any evidence that his decision to push the victim—a woman considerably smaller and older than he—was actually so motivated. Even Angela, the witness providing the most exculpatory version of the altercation, testified that, as Quevedo pushed her mother to the ground, he said only "Leave me alone," a statement suggesting that Quevedo's actions were motivated to defend himself rather than his home.

¶8 In determining whether Quevedo had presented "the slightest evidence" that he had pushed the victim in order to defend his premises, *Hussain*, 189 Ariz. at 337, 942 P.2d at 1169, the trial court also considered Quevedo's own statement to law enforcement officers about the incident. In that statement, which was placed in evidence by the state,

Quevedo suggested only that he pushed the victim because he was "just . . . trying to get away" and made no mention of any intent to defend his residence. Quevedo contends that the court's focus on this statement "was misplaced" because any inconsistencies in the evidence were for the jury to evaluate.

¶9 Although we agree with Quevedo's premise that a court may not decline to instruct a jury on an affirmative defense merely because the state has presented strong evidence contradicting that defense, the record suggests the court properly considered all the evidence presented, including the testimony by other witnesses "about what happened"—and did so in the context of the correct legal standard. As noted, the court acknowledged that Quevedo needed only to present "minimal" evidence that he had been motivated to protect his premises. And the record demonstrates the court ultimately declined to give the instruction because Quevedo had failed to provide any evidence at all of such motivation, not because Quevedo's own statement tended to contradict that defense.[1]

¶10 Affirmed.

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PHILIP G. ESPINOSA, Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

_____
J. WILLIAM BRAMMER, JR., Judge

[1]The trial court concluded, "There is no evidence that the defendant was preventing an illegal entry back into the premises."